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Nos. 99-1596 and 99-1600

In the Supreme Court of the United States

CARNIVAL CRUISE LINES, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PRINCESS CRUISES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the harbor maintenance tax imposed by 26 U.S.C. 4461 continues in force as applied to imports, domestic trade, and the carriage of passengers, notwithstanding this Court's holding in *United States* v. *United States Shoe Corp.*, 523 U.S. 360, 370 (1998), that the tax violated the Export Clause "as applied to exports."

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 99-1596 (Pet. App. 1a-16a)[1] is reported at 200 F.3d 1361, and its opinion in No. 99-1600 (99-1600 Pet. App. 1a-21a) is reported at 201 F.3d 1352. The opinions of the Court of International Trade in No. 99-1596 (Pet. App. 17a-23a, 24a-39a) are reported at 8 F. Supp. 2d 877 and 929 F.

[1] Unless otherwise noted, references are to the petition and the petition appendix in No. 99-1596.

Supp. 1570, and its opinion in No. 99-1600 (99-1600 Pet. App. 22a-31a) is reported at 15 F. Supp. 2d 801.

JURISDICTION

The judgments of the court of appeals were entered on January 5, 2000. The petition for a writ of certiorari in No. 99-1596 was filed on April 3, 2000, and the petition in No. 99-1600 was filed on April 4, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Water Resources Development Act of 1986 (WRDA), Pub. L. No. 99-662, 100 Stat. 4082, is a comprehensive statute designed to improve the nation's ports and harbors. Title XIV of the WRDA comprises the Harbor Maintenance Revenue Act of 1986, 26 U.S.C. 4461 *et seq.*, which imposes an *ad valorem* tax on port use by commercial importers, exporters, domestic shippers, and passenger liners (the harbor tax or HMT) in order to help fund the WRDA's harbor improvement programs. The harbor tax is imposed on "any port use," and is to be paid by the "importer," "exporter," or "shipper" on the basis of the value of the "commercial cargo" imported, exported, or shipped. 26 U.S.C. 4461(a)-(c). "Commercial cargo" is defined as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire." 26 U.S.C. 4462(a)(3)(A). Revenue from the tax is placed in a Harbor Maintenance Trust Fund, from which funds are drawn to improve the Nation's ports and harbors. 26 U.S.C. 9505 (1994 & Supp. IV 1998).

In *United States* v. *United States Shoe Corporation*, 523 U.S. 360, 363, 370 (1998), this Court held that the HMT is a "tax," rather than a "user fee," and therefore

"violates the Export Clause [U.S. Const. Art. I, § 9, Cl. 5] as applied to exports."

2. Petitioners operate commercial cruise ships. The United States Customs Service assesses the harbor tax on the value of all passenger travel that visits a port covered by the tax. See 26 U.S.C. 4462(a)(5)(B) (defining "value" of passenger transportation). Petitioners brought these suits in the United States Court of International Trade (CIT) challenging the Customs Service's manner of assessing the tax. Petitioners also claimed that if the HMT is unconstitutional as applied to exported goods, then it cannot be applied to passenger travel either, because the two applications are not "severable." Pet. App. 18a-19a.

In its first opinion in No. 99-1596 (Pet. App. 24a-39a), the CIT held that "the invalid export provisions of the HMT are severable from the valid portions" (*id.* at 39a). In its second opinion (*id.* at 17a-23a), issued after this Court's decision in *United States Shoe*, the CIT concluded that because "levying a tax on the value of commercial cargo loaded for export" violates the Export Clause, because the statute imposing the HMT "equate[s] passengers with cargo," and because the term "embark" (used of passengers) "is * * * synonymous with the term loading," it must follow that under "the ruling in *U.S. Shoe* voiding the HMT on the loading of cargo, * * * the HMT with respect to passengers runs afoul of the Export Clause of the Constitution." Pet. App. 22a- 23a. The court reached the same conclusion with respect to constitutionality in No. 99-1600. 99-1600 Pet. App. 28a-30a.

3. The court of appeals reversed in both cases. Pet. App. 1a-16a; 99-1600 Pet. App. 1a-21a.[2] The court rejected (Pet. App. 10a-16a) petitioners' argument, in support of the CIT's judgment, that the harbor tax cannot be imposed on the value of passenger transportation because that application cannot be severed from the tax's unconstitutional application to exported goods.[3]

The court first observed (Pet. App. 10a) that the WRDA "contains a broad severability clause." See 33 U.S.C. 2304.[4] Relying on this Court's decision in *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678 (1987), the court reasoned that the existence of such a clause "creates a presumption" in favor of severance, although a court must still consider whether the statute thus "created" is "legislation that Congress would not have enacted." Pet. App. 11a (quoting *Alaska Airlines*, 480 U.S. at 685, 687).

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[2] The court's opinion in No. 99-1600 incorporates by reference its discussion of the constitutional issue in No. 99-1596. 99-1600 Pet. App. 10a-11a. After ruling that the HMT is constitutional as applied to carriage of passengers, the court in No. 99-1600 also held that the tax is properly assessed when a ship stops in a covered port, even if the cruise begins from and ends in non-covered ports, and that petitioner Princess is responsible for a separate "arriving passenger fee" with respect to certain passengers. *Id.* at 11a-20a. Petitioner Princess does not challenge either of the latter holdings in this Court.

[3] Petitioners have not attempted to defend the CIT's reasoning, either before the court of appeals (Pet. App. 7a) or in this Court (Pet. 6 n.2).

[4] The court ruled that the severability clause applies to the provisions of the WRDA that enacted the HMT, just as it does to other provisions of the WRDA. Pet. App. 14a-15a.

The court found no sufficient reason to conclude that Congress "would not have enacted the remainder of the Harbor Tax had it known that the application of the tax to exports would be invalid." Pet. App. 12a. Noting that Congress chose to create the tax even though it was aware that application to exports might be unconstitutional, the court observed that the tax can continue to "function effectively and serve [its] purpose" of funding port and harbor improvements under the WRDA "even after the invalid application has been excised." *Ibid.*

As a textual matter, the court rejected (Pet. App. 12a-13a) petitioners' argument that because Congress did not enact a separate tax applicable only to "exports," there is nothing that can be "severed" from the statute, and the tax imposed on "any port use" may only be stricken in its entirety, even as applied to "cargo" other than exports. The general language imposing the tax, the court pointed out, "must be read in conjunction with the other statutory provisions," including those specifying when and by whom the unconstitutional tax on exports was to have been paid, which could be excised without affecting other applications of the tax. *Ibid.*

The court likewise found nothing in the legislative history to persuade it that Congress "would not have imposed the Harbor Tax without applying it to exports." Pet. App. 13a. Although Congress chose to impose a value-based rather than volume-based tax, it did so in order to avoid "disproportionately burden[ing] bulk commodities," which accounted for a substantial portion of both export and domestic shipping; and Congress's "'overriding intention' in enacting the tax was to provide revenue to fund port and harbor maintenance and improvement projects," not to "insur[e] that

exports properly contributed their fair share of the tax." *Id.* at 13a-14a. Moreover, although the history did reflect some concern that taxing imports but not exports could lead to conflicts with the United States' trading partners, the court noted that concerns about the effect of judicial rulings invalidating one application of the tax but not the other were "speculative and conjectural," and could be addressed by the Executive and Legislative Branches should the need arise. *Id.* at 15a-16a.

ARGUMENT

1. As the court of appeals recognized (Pet. App. 11a), the question of severability is one of legislative intent: An unconstitutional provision of a statute "must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987); see also *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999). Petitioners argue (Pet. 10-17) that the Federal Circuit misapplied that test in this case, because "Congress would not have enacted" a tax that applies, as the HMT does after *United States Shoe*, to "imports, coastwise trade, and passenger cruises, but not [to] exports." Pet. 10. The court below, however, properly reached the contrary conclusion, and its determination does not warrant review by this Court.

a. The plain language of the WRDA, which enacted the harbor tax, supports the court of appeals' determination. The Act specifically provides that:

> If any provision of this Act, *or the application of any provision of this Act to any person or circumstance*, is held invalid, *the application of such*

> *provision to other persons or circumstances*, and the remainder of this Act, shall not be affected thereby.

33 U.S.C. 2304 (emphasis added).[5] Although such provisions may not always be dispositive with respect to particular severability questions, see Pet. App. 10a-11a, they provide a strong indication of the relevant legislative intent, and indeed "create[] a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines*, 480 U.S. at 686. That presumption may be overcome only by "strong evidence" to the contrary. *Ibid.*

Petitioners argue that because 26 U.S.C. 4461(a) states a "general rule" imposing a tax on "any port use," while the use of ports to export goods cannot be taxed under *United States Shoe*, there is in this case "no provision to sever." 99-1600 Pet. 8; Pet. 11, 19 n.11. They contend that the court of appeals should therefore have invalidated the HMT in its entirety, rather than "re-draft[ing] the law" by holding that it continues to apply in cases that do not involve exports. 99-1600 Pet. 8.

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[5] Citing *United States* v. *Locke*, 120 S. Ct. 1135, 1146 (2000), petitioners renew in passing their argument that the severability clause does not apply to the provisions of the HMT. See Pet. 6 n.3, 21 n.12. The court of appeals correctly rejected that contention. Pet. App. 14a-15a. The clause appears in Title IX of the WRDA, entitled "General Provisions," and its use of the term "this Act" naturally refers to the entire WRDA—of which Title XIV, enacting the HMT, is a part. There is nothing to suggest otherwise in *Locke*, which held only that Congress intended a specifically worded savings clause in one substantive title of a statute to have a correspondingly specific and limited scope. See 120 S. Ct. at 1144, 1146.

Contrary to petitioners' suggestion, the question whether an unconstitutional application of a statute should be "severed" from its constitutional applications is not fundamentally different from the question whether a discrete, unconstitutional provision should be severed from an otherwise constitutional Act. Both are ultimately questions of legislative intent. See Nagle, *Severability*, 72 N.C. L. Rev. 203, 208 & n.24 (1993); 2 N. Singer, *Sutherland Statutory Construction* §§ 44.02-44.03 (5th ed. 1993). This Court has held that statutes could not constitutionally be applied in certain situations, without striking them down in their entirety or suggesting any such result. See, *e.g.*, *United States* v. *Grace*, 461 U.S. 171, 178-184 & n.9 (1983); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 504-507 (1985); *Wisconsin* v. *Yoder*, 406 U.S. 205, 207 n.2, 234-236 & n.22 (1972) (holding that certain aspects of state compulsory school-attendance law could not be applied to Amish parents, but expressly disclaiming (at 236) any intention to "undermine the general applicability" of those statutes); cf. *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 521 & n.26 (1981) (plurality opinion) (holding billboard ordinance unconstitutional to the extent it included prohibitions on non-commercial speech, but remanding to state court for determination whether ordinance should be "sustain[ed] * * * [in part] by limiting its reach to commercial speech").

The Court has, moreover, observed that a legislature may, through a severability clause, specifically "provide that if application of a statute to some classes is found unconstitutional, severance of those classes permits application to the acceptable classes." *Wyoming* v. *Oklahoma*, 502 U.S. 437, 460-461 (1992). That is exactly what Congress did in the WRDA, and the court of appeals was correct to honor that express legislative

direction. Compare 33 U.S.C. 2304, quoted above, with *Wyoming*, 502 U.S. at 461 n.14 (citing substantially identical severability provision involved in *INS* v. *Chadha*, 462 U.S. 919, 932 (1983)), and *Brockett*, 472 U.S. at 506-507 n.14 (relying in part on similar severability provision in holding that there was "no obstacle to partial invalidation" of statute).

In any event, as the court of appeals pointed out, petitioners err in seeking "to read the '[g]eneral rule' provision" in Section 4461(a) "in isolation from the remainder of the statute," rather than "in conjunction with the other statutory provisions, which explain and describe its operation." Pet. App. 13a. Section 4461(a) imposes a tax on "port use," and subsection (b) prescribes the base and rate of tax. Subsections (c) and (d) then specify who must pay the tax, and when. Those subsections differentiate expressly among exporters and others, and between exports and all other sorts of cargo. 26 U.S.C. 4461(c)(1)(B) and (c)(2)(A); see Pet. App. 2a-3a, 42a (setting out provisions). The provisions referring to exports and exporters may be straightforwardly "severe[d]" from the remainder of Section 4461, and they leave a statute that designates how the HMT is to be figured (on the value of cargo), who is to pay it (importers and shippers), and when it is to be paid (at the time of unloading). This is not, accordingly, a case in which the statute in question "nowhere sets up" the appropriate line for severance, Pet. 11 (quoting *Sloan* v. *Lemon*, 413 U.S. 825, 834 (1973)), but rather one in which "the text * * * identifie[s] a clear line" that the courts may draw. *Reno* v. *ACLU*, 521 U.S. 844, 884 (1997) (citing *Brockett* and *Grace*).[6]

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[6] Petitioners labor unsuccessfully (Pet. 18-24) to demonstrate some sort of conflict between this Court's decisions in *Reno* and

b. Relying on legislative history and the foreign-policy sensitivity of questions involving international trade, petitioners argue (Pet. 11-17) that Congress would not have enacted the HMT if it could not be applied to exports, as well as to imports, passenger transportation, and domestic cargo. As the court of appeals reasoned (Pet. App. 12a), however, the HMT was enacted "to raise money to help fund the port and harbor improvements" envisioned by the WRDA.[7] The tax "continue[s] to perform that function, although on a lesser scale," even though it may not be applied to exports. *Ibid.*

Obviously, Congress would have *preferred* for the tax to apply to exports as well. Any inquiry into severability is, from the affected legislature's point of view, an inquiry into what option is second-best. Here, the second-best solution is manifest. At the time it considered and passed the WRDA, Congress was aware that the Export Clause might bar application of the HMT to exports. Pet. App. 12a. It nonetheless enacted the tax, along with the severance clause discussed

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Alaska Airlines. *Reno* refused to preserve the possibility that there might be some constitutional applications of a ban on certain "indecent" speech, in part because the challenge before it was facial rather than "as applied," and in part because the "open-ended" statute in question provided "no guidance whatever for limiting its coverage." 521 U.S. at 883-884. Nothing in that analysis is inconsistent with *Alaska Airlines*—or, as the text demonstrates, with the court of appeals' decision in this case. See also *Mille Lacs*, 526 U.S. at 191 (restating traditional test).

[7] Enactment of the HMT to offset port and harbor maintenance costs was an essential element of the WRDA package. See H.R. Rep. No. 251, 99th Cong., 1st Sess. Pt. 4, at 42 (1985); S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985); 132 Cong. Rec. 4940 (1986) (statement of Sen. Stafford).

above.[8] As the court of appeals rightly concluded (*id.* at 13a-16a), nothing in the legislative history demonstrates that if Congress had known it could not impose the HMT on exports, it would instead have chosen to impose no tax at all.

Petitioners stress (Pet. 12) Congress's desire to impose a "uniform" tax. As we have noted, what Congress thought ideal is not the relevant inquiry, because the starting point here is that the Constitution has precluded that approach. In any event, as the court below recognized (Pet. App. 13a-14a), the concern with respect to "uniformity" was to avoid disadvantaging shippers of high-volume products such as coal in relation to shippers of high-value products such as computer chips—not to avoid disadvantaging importers, domestic shippers, or cruise lines in relation to exporters. See H.R. Rep. No. 251, 99th Cong., 1st Sess. Pt. 4, at 24-26 (1985). To the extent that Congress was troubled by the relative tax burdens on exports and imports, the concern was clearly to avoid overburdening *exports*, not to achieve equity for importers or passenger carriers. See Pet. 12-13 & n.7.

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[8] The House Merchant Marine and Fisheries Committee, on whose report petitioners rely (Pet. 12-14), recommended passage of a clause providing specifically that if the HMT were held "invalid in one or more of its applications," it should "remain[] in effect in all valid applications that are severable from the invalid applications." Pet. App. 14a (quoting H.R. Rep. No. 251, *supra*, at 13). "The concern of the Committee * * * was, for example, that the constitutional arguments that had been made against imposing a tax on exports might result in the legislation being declared invalid and it [was] the desire of the Committee to preserve all other provisions of the Act if that or a similar provision be found invalid." *Id.* at 30; see also *id.* at 34. Ultimately, Congress adopted one severability clause for the entire WRDA.

Nor does evidence in the legislative history concerning Congress's natural concern over relations with our trading partners, see Pet. 13-17, justify an inference that if Congress could not tax both exports and travel on cruise ships, it would have chosen to tax neither. The continued need for funding for ports and harbors, and the continued efficacy of the HMT in providing that funding even if it cannot be applied to exports, are clear and concrete. See, *e.g.*, U.S. Army Corps of Engineers, *Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1998*, at 17 (Dec. 1999). By contrast, the merit and likely ultimate consequences of complaints by our trading partners, based on the invalidation of the HMT as applied to exports, are at best unclear even now. See Pet. App. 16a. At the time the WRDA was passed they would have been wholly speculative. Congress's possible awareness that invalidation of the HMT as applied to exports might lead to future trade disputes therefore provides no basis for refusing to enforce the tax to the extent that it is constitutional—particularly in light of Congress's specific directive in the severability clause.[9] In any event, if and when such disputes materialize, their resolution is a matter for the President and for Congress, which is fully capable of reconsidering the design and advisability of the HMT, in light of *United States Shoe*, if it wishes to do so.

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[9] Even when the pertinent issues are squarely raised, Congress does not always choose to avoid such disputes. Cf. 19 U.S.C. 2504(a) ("No provision of any trade agreement * * * nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States.").

2. Petitioners suggest the existence of "conflicts and confusion * * * among the courts of appeals" on the proper approach to severance questions (Pet. 18), but the two cases they cite do not support that suggestion.

In *United States* v. *Spokane Tribe of Indians*, 139 F.3d 1297, 1299 (9th Cir. 1998), the court applied the traditional severance test, asking whether Congress would have enacted the statute at issue "in the absence of one of its key provisions," which this Court had invalidated. The court suggested (without holding) that the statute might have to be invalidated in its entirety, because "[m]ost likely [the statute] would not have been enacted" without the invalid enforcement mechanism. See *id.* at 1301. The court noted, however, that the statute might remain enforceable, if under particular circumstances its operation would be "close enough to what Congress had in mind." *Ibid.*

In *Ackerley Communications of Massachusetts, Inc.* v. *City of Cambridge*, 135 F.3d 210, 215 (1st Cir. 1998), the court confronted a question of severability under Massachusetts law, which involved much the same sort of inquiry as the traditional federal test applied in *Spokane Tribe*: "[W]hether [the ordinance] would have been enacted had the City Council known that it would" apply only to signs conveying commercial, as opposed to non-commercial, messages. *Ibid.* Citing *Reno* for the proposition (undisputed here) that "[s]everability clauses, though probative of legislative intent, are not conclusive" (*id.* at 215-216; compare Pet. App. 10a-11a), the court refused to read a distinction between commercial and non-commercial speech into an ordinance no part of which "allude[d] in any way to [such] a substantive distinction." 135 F.3d at 216. Nothing in that decision conflicts with anything in *Spokane Tribe*,

and nothing in either case conflicts with the decision below. See pp. 9-11 & n.6, *supra*.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] There will, of course, never be any conflict on the precise question presented in this case, because challenges to the application of the HMT fall within the Federal Circuit's exclusive jurisdiction. See 28 U.S.C. 1295(a)(5), 1581(i); *United States Shoe*, 523 U.S. at 365-366.